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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
TRENTON DIVISION**

INTERACTIVE MEDIA ENTERTAINMENT AND GAMING ASSOCIATION, L.L.C., a limited liability corporation of the State of New Jersey,	
Plaintiff,	**HON. MARY L. COOPER**
	Civil Action No. 07-2625 (MLC)(TJB)
v.	**REPLY IN SUPPORT OF DEFENDANTS' CROSS-MOTION TO DISMISS**
	RETURN DATE: SEPTEMBER 26, 2007
PETER D. KEISLER,* Acting Attorney General of the United States, THE FEDERAL TRADE COMMISSION, and THE FEDERAL RESERVE SYSTEM,	***DOCUMENT FILED ELECTRONICALLY***
Defendants.	

* Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Acting Attorney General Peter D. Keisler has been substituted as a Defendant in this action.

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INTRODUCTION

Defendants' cross-motion to dismiss demonstrated that every one of Plaintiff's challenges to the Unlawful Internet Gambling Enforcement Act ("UIGEA") fails under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. Apparently conceding all of Defendants' arguments as to Plaintiff's Tenth Amendment and Ex Post Facto claims, Plaintiff's Opposition only addresses the jurisdictional grounds Defendants raised for dismissing its First Amendment and treaty-based claims. However, in urging the Court to reject those grounds, Plaintiff relies on mischaracterizations of the UIGEA and misapplications of the law to the facts here. Neither is a proper basis on which to find either that Plaintiff has standing to bring those claims or that those claims are ripe.

But even if Plaintiff's arguments were meritorious – and they clearly are not – Plaintiff's Opposition completely ignores Defendants' alternative argument, that dismissal of those claims is nevertheless warranted for failure to state a claim. Since Plaintiff's Opposition does nothing to dispel that conclusion, this Court should grant Defendants' cross-motion and dismiss this action.

ARGUMENT

I. Plaintiff Lacks Standing to Challenge the UIGEA Under the First Amendment.

As Defendants' motion demonstrated, none of Plaintiff's alleged bases for standing is sufficient under the applicable legal standard. *See* Defendants' Opposition to Plaintiff's Motion for Temporary Restraining Order and Memorandum in Support of Defendants' Cross-Motion to Dismiss ("Def. Mot.") at 10-19. While ignoring certain of Defendants' arguments,[1] Plaintiff's

[1] Defendants respectfully refer the Court to their motion to dismiss for a discussion of those arguments which Plaintiff, through its silence, apparently concedes. *See Haesler v. Novartis Consumer Health, Inc.*, 426 F. Supp. 2d 227, 230 (D.N.J 2006) (inferring a concession from plaintiffs' silence); *Johnson v. Guhl*, 91 F. Supp. 2d 754, 774 n.20 (D.N.J. 2000) (inferring concession from defendants' failure to address an argument); *e.g.*, Def. Mot. at 17 ("Plaintiff

Opposition purports to address those arguments related to Plaintiff's First Amendment claims. *See* Plaintiff's Response to Defendants' Motion to Dismiss Complaint and Reply to Defendant's Response to Motion for Issuance of Temporary Restraining Order ("Pl. Opp.") at 6-18. When stripped of its numerous black-letter law recitations, Plaintiff's argument boils down to two points. First, its members' fear of prosecution is sufficient to confer standing even though no member has been threatened with prosecution under the UIGEA. *See* Pl. Opp. at 9-14. Second, this Court should infer from a "real world demonstration of direct economic loss" that Plaintiff's members have suffered an economic injury sufficient to confer standing [2] *See* Pl. Opp. at 14-18. Both arguments are without merit.

A. Plaintiff Has Not Demonstrated a Credible Threat of Prosecution Under the UIGEA.

Even though Plaintiff "has not identified a single arrest, threatened prosecution, or actual prosecution of any of its members under that Act," (Def. Mot. at 14), Plaintiff contends that it is enough for standing purposes that "Plaintiff is deterred from exercising [its] right to free expression or foregoes expression in order to avoid enforcement consequences." Pl. Opp. at 12

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lacks standing to challenge the UIGEA as an ex post facto law."); *id.* at 17-19 ("Plaintiff lacks standing to challenge the UIGEA under the Tenth Amendment.").

[2] Although Defendants demonstrated that Plaintiff's allegations of the UIGEA's chilling effect were insufficient to confer standing, (Def. Mot. at 12-13), Plaintiff appears to address this argument with the single statement "Plaintiff submits that it is essential to recall the terms of the UIGEA, in particular its impact on the First Amendment, the commercial livelihood of iMEGA's members and the UIGEA's criminal penalty provisions." Pl. Opp. at 7 (emphasis omitted). That statement hardly addresses the deficiencies Defendants identified. *See* Def. Mot. at 12-13 (demonstrating that a mere subjective chilling is insufficient to establish standing); Def. Mot. at 13 (demonstrating the absence of a connection between the alleged chill and the UIGEA's prohibitions). To the extent that Plaintiff purports to address these arguments with the newly asserted allegations about "affiliates" and "affiliate marketers," such allegations are similarly deficient. *See* Pl. Opp. at 8-9.

(asserting that standing in a pre-enforcement challenge of a criminal statute is "not a difficult standard to meet"). Plaintiff, however, misapprehends the law. As Plaintiff correctly cited in its Opposition, (*see* Pl. Opp. at 10), in pre-enforcement challenges to statutes criminalizing an exercise of First Amendment rights, standing exists when a "plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution." Pl. Opp. at 10 (citing *Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979)). In those circumstances, courts have held that it is not necessary for the plaintiff to expose himself to prosecution to bring a statutory challenge in federal court. *Id.* at 298. This action, however, does not come within those authorities.[3]

Plaintiff has not alleged an intention to engage in constitutionally protected conduct that is prohibited by the UIGEA. Although Plaintiff mischaracterizes the UIGEA as "presuppos[ing] the elimination of th[e internet gambling] industry and its direct/indirect supporters," (Pl. Opp. at 9), the criminal prohibitions of the Act are rather limited. The UIGEA imposes criminal liability only for violations of Section 5363, which provides that

> [n]o person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling – (1) credit, or the proceeds of credit, extended to or on behalf of such other person . . .; (2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of [such] . . .; (3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or (4) the proceeds of any other form of financial transaction, as the Secretary and the

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[3] In one of the authorities on which Plaintiff relies, *Pic-A-State v. Reno*, 76 F.3d 1294 (3d Cir. 1996), the Third Circuit noted that *Babbitt* and similar authorities "involved challenges to statutes that criminalized the exercise of First Amendment rights" and since, as here, plaintiff's claim did not, the court did not rely on those authorities. *Id.* at 1299 n.3.

> Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.

31 U.S.C. § 5363. The Act thereby proscribes only conduct – the acceptance of various forms of payment in connection with unlawful internet gambling – not speech and therefore does not implicate First Amendment rights. Plaintiff moreover has not alleged that its members intend to engage in the conduct described in Section 5363. *See* Pl. Opp. at 8 (alleging instead, for example, that members "operate and/or maintain and/or own websites and/or 'portals', which allow visitors/customers with access to a variety of informational content involving gaming/gambling"). But even if Plaintiff had, as evident from the statutory language, the conduct proscribed by the UIGEA is not affected with a constitutional interest. *See* Def. Mot. at 22-23 ("The conduct regulated by the UIGEA – the knowing acceptance by a gambling business of the proceeds of an illegal internet gambling transaction – is not protected.").

As Defendants' motion demonstrated, Plaintiff also has not satisfied the credible-threat-of-prosecution requirement of standing in a pre-enforcement challenge. *See* Def. Mot. at 14-15. In an effort to bolster its deficient allegations, Plaintiff suggests its fear of prosecution is not unfounded because in hearings on the UIGEA, "former Attorney General Defendant Alberto Gonzales promised . . . that he would do everything in his power to ensure the billion-dollar [internet gambling] industry has been quashed." Pl. Opp. at 11. Here again Plaintiff seeks to withstand dismissal based on a gross mischaracterization. In hearings on "Oversight of the Department of Justice," *and not the UIGEA*, the then Attorney General was asked during the questions-and-answers session about the forthcoming regulations under the UIGEA. Former Attorney General Alberto Gonzales actually remarked that "what I can commit to you is that we're going to do everything we can to make sure these regulations are strong and we get them implemented as quickly as we can." Verbatim Transcript of Judiciary Committee Hearing on Oversight of the Department of Justice (Apr. 19, 2007), reprinted at 2007 WL 1157338 (F.D.C.H.). Thus, Plaintiff's mischaracterization of the former Attorney General's statement does nothing to demonstrate that Plaintiff's alleged threat of prosecution is credible.

B. Plaintiff Cannot Base Standing on Rank Speculation about the Economic Losses of Third Parties.

In response to Defendants' demonstration that none of Plaintiff's allegations demonstrates "that any of Plaintiff's members faces immediate financial destruction," (Def. Mot. at 15), Plaintiff identifies what it characterizes as a "real world demonstration of direct economic loss" and urges this Court to infer from that loss that the UIGEA has caused financial injury to Plaintiff's members. Pl. Opp. at 15 (asserting that the stock of a British Internet Gambling company "tumbled from a high of approximately $2.25 per share on the eve of adoption of the UIGEA to a present low of $.059 per share"). This allegation is insufficient to cure the deficiencies Defendants identified. First, the identified British company is not alleged to be a member of Plaintiff on whose behalf it purports to bring this action. Second, Plaintiff merely speculates that the stock loss was caused by the UIGEA, and therefore even if that company were a member, that allegation is rank speculation. *See* Certification Supplementing Response to Opposition to Motion and Request for Temporary Restraints ¶ 13 (noting that observed drop in stock price *"appears to confirm* that the value of shares of Internet Gambling concerns is directly related to the proscription of use of payment system instruments which would allow it to function" (emphasis added)). Speculation is an insufficient basis for standing. *See Simon v.*

Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 44 (1976) ("unadorned speculation will not suffice to invoke the federal judicial power"). Thus, Plaintiff's "real world" example is an untenable basis for its standing.

II. Plaintiff Lacks Standing to Challenge the UIGEA's Alleged Inconsistency with a World Trade Organization ("WTO") Decision.

Plaintiff disputes clear congressional intent in contending that "iMEGA is clearly entitled to enforce the final Appellate Panel decision of the WTO dispute in this case." Pl. Opp. at 32. As Defendants demonstrated, by statute, "[n]o person other than the United States" may bring such an action. *See* 19 U.S.C. § 3512(c)(1)(A) (providing that "[n]o person other than the United States . . . shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement");[4] 19 U.S.C. § 3512(c)(1)(B) (providing that "[n]o person other than the United States . . . may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States . . . on the ground that such action or inaction is inconsistent with such agreement"). Plaintiff nevertheless contends that "[s]uch is not the case." Pl. Opp. at 34. None of the authorities on which Plaintiff relies, however, supports that erroneous contention.

Plaintiff cites several cases involving challenges to state or local laws as inconsistent with U.S. treaty obligations. *See* Pl. Opp. at 31 (citing *Kolovrat v. Oregon*, 366 U.S. 187 (1961) and *Asakura v. Seattle*, 265 U.S. 332 (1924)). In that context, the Supreme Court has recognized that rights under local law "may be affected by an overriding federal policy when a treaty makes different or conflicting arrangements." *Kolovrat*, 366 U.S. at 190; *id.* (noting that such rights "must give way under our Constitution's Supremacy Clause to overriding federal treaties and conflicting arrangements"). Here, where Plaintiff seeks to challenge a *federal law* as inconsistent with a treaty obligation, that principle is inapplicable.

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[4] The WTO is incorporated under the Uruguay Round Agreements. *See* Uruguay Round Agreement Act, Pub. L. 103-465, Title I, § 101(d), 108. Stat. 4814 (Dec. 8, 1994).

Plaintiff also purports to demonstrate that under a three-part test set forth in the dissenting opinion in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), Plaintiff has standing to enforce a WTO decision. *See* Pl. Opp. at 31-33. It is well established, however, that "a dissenting Supreme Court opinion is not binding precedent." *United States v. Ameline*, 409 F.3d 1073, 1083 n.5 (9th Cir. 2005); *Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1513 (11th Cir. 1996); *see also United States v. Romain*, 393 F.3d 63, 74 (1st Cir. 2004) ("A dissenting opinion is, of course, not binding precedent . . . ."). Plaintiff therefore cannot avoid the clear statutory prohibition against its claim by relying on the *Sanchez-Llamas* dissent.

Plaintiff lastly invites this Court to regard as "illustrative" *Public Citizen v. Department of Transportation*, 316 F.3d 1002 (9th Cir. 2003). The comparison that Plaintiff makes, however, is illusory. *See* Pl. Opp. at 36 (asserting that "the failure to adopt regulations under the UIGEA, in light of Veroneau's official pronouncement that the United States will continue with its WTO commitment, is tantamount to the presidential commitment in *Public Citizen*"). The *Public Citizen* court referenced the President's commitment to lift a moratorium on Mexican trucks in discussing the causation element of standing. *See Public Citizen*, 316 F.3d at 1018 (discussing standard for causation where alleged injury depends in part of the independent action of a third party such as the President). Although the court described that commitment as "obligated under an important international treaty," the court was not asked to nor did it decide that the challenged agency conduct violated a treaty agreement. *See id.* at 1032 ("emphasiz[ing] that we draw no conclusions about the actions of the President of the United States nor the validity of NAFTA, neither of which is before us. The only question before us is whether a federal agency failed to comply with our nation's long-established environmental laws").[5] Thus, *Public Citizen* is inapposite. Since Plaintiff has utterly failed to demonstrate the inapplicability of the statutory prohibition against private actions under any of the Uruguay Round Agreements, Plaintiff's treaty-based challenge to the UIGEA fails for lack of standing. *See* Def. Mot. at 16-17.

III. Plaintiff's Constitutional Challenge of the Forthcoming Regulations Under the UIGEA Is Unripe Because Those Regulations Have Yet to Issue.

As Defendants demonstrated, the ripeness doctrine dictates that this action be dismissed as unripe because this Court clearly cannot decide that regulations that do not exist violate either the Constitution or a WTO decision. *See* Def. Mot. at 21. Although it is theoretically possible that one of Plaintiff's members might someday in the future be prosecuted under the UIGEA, the Complaint fails to provide a basis for this Court to determine whether such prosecution would be unconstitutional. *See* Def. Mot. at 21-22. None of these arguments is disputed in Plaintiff's Opposition. Indeed, Plaintiff admits that the regulations it challenges have yet to issue. *See* Pl.

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[5] Plaintiff suggests that the President's declared intention to honor a treaty obligation was considered "[i]n determining whether Plaintiffs were entitled to have a restraining order issued." Pl. Opp. at 35. To the extent Plaintiff interprets *Public Citizen* as demonstrating Plaintiff's entitlement to such relief, that interpretation is misguided. *See* Pl. Opp. at 36 (noting the United States' intention to clarify its commitments under the Uruguay Round Agreements and suggesting that it "is tantamount to the presidential commitment in *Public Citizen*"). The Supreme Court reversed *Public Citizen* and the mandate granting the plaintiff relief was recalled. *See Department of Transp. v. Public Citizen*, 541 U.S. 752 (2004), *on remand Public Citizen v. Department of Transp.*, 378 F.3d 958 (9th Cir. 2004).

Opp. at 22, 23, 25, at 28. Plaintiff nevertheless contends that this "case is clearly ripe for review." Pl. Opp. at 23. That contention, however, is not based on any claims in the present action but on an Administrative Procedure Act ("APA") claim that Plaintiff has not brought. *See* Pl. Opp. at 28 (contending that "the lack of mandated administrative action to define the legal and illegal, criminal or civil, specific conduct under the UIGEA renders the matter ripe as a final administrative action").

Plaintiff cannot amend the Complaint through argument in an opposition brief. *See Commonwealth v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988) ("it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss" (internal quotations omitted)); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) (same); *see also Harrell v. United States*, 13 F.3d 232, 236 (7th Cir. 1993) ("If a complaint fails to state a claim even under the liberal requirements of the federal rules, the plaintiff cannot cure the deficiency by inserting the missing allegations in a document that is not either a complaint or an amendment to a complaint."). Therefore, Plaintiff's suggestion that an APA claim challenging Defendants' failure to issue regulations would be ripe is irrelevant to this Court's determination. Since the claims actually in this action are unripe for the reasons explained in Defendants' motion, this Court should dismiss this action. *See* Def. Mot. at 19-21.

IV. The UIGEA Is not a Content-Based Restriction on Speech and Therefore is not Subject to Strict Scrutiny.

As Defendants' motion demonstrated, even if this Court were to conclude that Plaintiff has standing to bring its First Amendment claims, dismissal of those claims is nevertheless warranted for failure to state a claim. *See* Def. Mot. at 23 ("As a regulation of unprotected conduct that itself neither contains nor manifests protected expression, the UIGEA is not subject to First Amendment scrutiny at all."); Def. Mot. at 24-25 (demonstrating that "the UIGEA does not unconstitutionally interfere with Plaintiff's expressive activities"); Def. Mot. at 26-27 (demonstrating that the "UIGEA does not violate Plaintiff's right of privacy"); Def. Mot. at 27-28 (demonstrating that the UIGEA does not regulate commercial speech but even if it did, the UIGEA is not "an unconstitutional regulation of commercial speech"). Plaintiff's Opposition again addresses none of these arguments. *See* Pl. Opp. at 17 (erroneously asserting that "Defendants have not advanced any opposition to Plaintiff's challenge to the constitutionality of the UIGEA"). Instead, Plaintiff seeks to impose on Defendants "the burden of proof on the ultimate question of constitutionality" and invites this Court to deem Plaintiff "likely to prevail unless the Government has shown that demonstrated less restrictive alternatives are less effective than the statute being challenged." Pl. Opp. at 18 (citing *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004)). That standard, however, applies to content-based speech restrictions – which the UIGEA obviously is not. *See id* at 665-66 (explaining that in considering a content-based speech restriction, "a court assumes that certain protected speech may be regulated, and then asks what is the least restrictive alternative that can be used to achieve that goal").

As the language of the UIGEA makes clear, the Act is not a regulation of speech at all. Rather, the UIGEA prohibits a person engaged in the business of betting or wagering from knowingly accepting monetary instruments (e.g., credit, electronic fund transfer, check) "in connection with the participation of another person in unlawful Internet gambling." 31 U.S.C. § 5363. Thus, Plaintiff's gross mischaracterizations of the reach of the UIGEA are to no avail.

See, e.g, Pl. Opp. at 8 (alleging that "providing 'information and instructions as to the establishment or usage of funds,' in connection with Internet gaming/gambling . . . can be punishable under the UIGEA"); *id.* at 9 (alleging that the "very enactment of the UIGEA presupposes the elimination of th[e Internet gaming/gambling] industry and its direct/indirect supporters"); *id.* at 10 (alleging that the UIGEA "threaten[s] criminal prosecution of . . . the average citizen of the United States, sitting home and playing Internet poker on her wireless laptop"); *id.* at 18 (alleging that the UIGEA "criminaliz[es] the[] promotion of Interactive Internet activities"); *id.* at 20 (alleging that the UIGEA "criminaliz[es] the mere passage of credit along established credit avenues"); *id.* (alleging that "the UIGEA does not account for the variation in state laws . . . between states which legalize gambling"); *id.* at 21 (alleging that the "UIGEA opens the door to censorship of literature which may be deemed to support terrorism").

As a regulation of unprotected conduct that itself neither contains nor manifests protected expression, the UIGEA – *even if it indirectly affects protected expression* – is not subject to First Amendment scrutiny at all. *See* Def. Mot. at 22-24; *see also Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh*, 229 F.3d 435, 446 (3d Cir. 2000) (noting that "'[a]ny other conclusion would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences . . . would require analysis under the First Amendment'"); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572 (1991) (Scalia, J., concurring in the judgment) ("a general law regulating conduct and not specifically directed at expression, [] is not subject to First Amendment scrutiny at all"). But even if such scrutiny were appropriate, strict scrutiny clearly is not.[6] *See Pi Lambda*, 229 F.3d at 445-46 (noting that "[t]he most rigorous standard of review is triggered when the [government] action directly burdens expressive rights"). Since Plaintiff's arguments are erroneously predicated on that standard, they are without merit. *See* Def. Mot. at 23-24 (explaining that "the Court can easily reject Plaintiff's attempts here to subject the UIGEA to such analysis").

CONCLUSION

For the foregoing reasons and those explained in Defendants' Opposition to Plaintiff's Motion for Temporary Restraining Order and Memorandum in Support of Defendants' Cross-Motion to Dismiss, Defendants respectfully request that the Court grant this motion and dismiss this action.

September 21, 2007

Respectfully submitted,

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[6] Defendants' motion demonstrated that, at a minimum, the UIGEA passes constitutional muster under intermediate scrutiny. *See* Def. Mot. at 27-28.

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CERTIFICATE OF SERVICE

I certify that on this 21st day of September 2007, I caused a copy of the foregoing Reply in Support of Defendants' Cross-Motion to Dismiss to be filed electronically and that the document is available for viewing and downloading from the ECF system.

/s Jacqueline Coleman Snead
JACQUELINE COLEMAN SNEAD